

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking)
In the Review of the)
California High Cost Fund)
_____)

R.06-06-028

**REPLY COMMENTS OF SPRINT NEXTEL
ON PROPOSED DECISION IMPLEMENTING
CALIFORNIA ADVANCED SERVICES FUND**

Stephen H. Kukta, Esq.
Kristin L. Jacobson, Esq.
Sprint Nextel
200 Mission Street, Suite 1400
San Francisco, CA 94105
Telephone: (415) 572-8358
Facsimile: (415) 278-5303
Email: Stephen.h.Kukta@Sprint.com

Earl Nicholas Selby
Law Offices of Earl Nicholas Selby
418 Florence Street
Palo Alto, CA 94301-1705
Telephone: (650) 323-0990
Facsimile: (650) 325-9041
Email: ens@loens.com

Attorneys for Sprint Nextel

Dated: December 17, 2007

Table of Contents

Table of Contents	i
Table of Authorities	ii
Introduction	1
Discussion	1
I. THE COMMISSION SHOULD USE THE FCC’S DEFINITION OF “BROADBAND” TO IDENTIFY “UNSERVED” AREAS ELIGIBLE FOR CASF FUNDING.	1
II. THE COMMISSION SHOULD MORE PRECISELY IDENTIFY THE SOURCE OF FUNDING FOR THE CASE.	4
Conclusion	5
Certificate of Service	

Table of Authorities

Decisions and Orders of the Federal Communications Commission

In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. WC 06-74, Memorandum Opinion and Order, FCC 06-189 (released March 26, 2007), Appendix F4

In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, WC Docket 07-38.2

In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, GN Docket No. 07-45, Notice of Inquiry, FCC 07-21 (released April 16, 2007), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-21A1.pdf2

California Public Utilities Commission Decisions

Order Instituting Rulemaking into Review of the California High Cost Fund B Program, R.06-06-028, Interim Opinion Adopting Reforms to the High Cost Fund-B Mechanism [D.07-09-020] (2007) __ CPUC 2d __, 2007 Cal. PUC LEXIS, *app. for reh. pending* (filed October 9, 2007, by The Utility Reform Network (“TURN”))5

Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of Telecommunications Utilities, R.05-04-005, Opinion [D.06-08-030] (2006) __ CPUC 2d __, 2006 Cal. PUC LEXIS 367 (“D.06-08-030”) (*mimeo.*) at 132, 263-68, *modified and limited rehearing granted and rehearing otherwise denied* [D.06-12-044] (2006) __ CPUC 2d __, 2006 Cal. PUC LEXIS 511.3

Statutes

Federal Statutes

Telecommunications Act of 19962

California Public Utilities Code

Section 5800.2

Section 5830, subd. (a).2

Section 5890.3

Digital Infrastructure and Video Competition Act (“DIVCA”), Stats. 2006, c. 700, §32

Miscellaneous

High-Speed Services for Internet Access: Status as of June 30, 2006, Industry Analysis and Technology Division, Wireline Competition Bureau, January, 2007, available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf	2
Connecting California, California Public Utilities Commission, Telecommunications Division, Broadband Report Update, dated September 20, 2006	3

Introduction

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, Sprint Communications Company, L.P. (U 5112 C), Sprint Telephony PCS, L.P. (U 3064 C), Sprint Spectrum L.P. as agent for Wireless Co., L.P. (U 3062 C) *dba* Sprint PCS, and Nextel of California, Inc. (U 3066 C) (collectively, "Sprint Nextel"), respectfully submit these Reply Comments on the November 20, 2007 Proposed Decision of Commissioner Chong ("PD") creating the California Advanced Services Fund ("CASF").

Review of the opening comments filed by other parties reveals there are substantial misgivings about the CASF. As explained in Sprint Nextel's Opening Comments, before moving ahead with the CASF, if at all, the Commission should reconsider the policy and legal footing for the CASF, as well as its key organizational and operational details.

In these Reply Comments, Sprint Nextel will focus on two different topics: (a) identifying the areas in California that would be eligible for CASF funding and (b) the means by which the Commission would purportedly raise the funds necessary for funding the CASF.

Discussion

I. THE COMMISSION SHOULD USE THE FCC'S DEFINITION OF "BROADBAND" TO IDENTIFY "UNSERVED" AREAS ELIGIBLE FOR CASF FUNDING.

In its opening comments, Sprint Nextel urged the Commission, if it creates the CASF at all, to restrict CASF funding to areas of California that are truly "unserved" by any provider of broadband services.¹ Sprint Nextel recommended that the Commission not provide CASF funding to any area deemed "served" by a broadband provider.² However, recognizing the possibility that the Commission might continue, over Sprint Nextel's objections, to employ the concept of "underserved" areas, Sprint Nextel also recommended an alternative approach: "underserved" areas would be eligible for CASF funding, if at all, *only after all* "unserved" areas could be deemed "served."³

As Cox California Telcom, L.L.C. ("Cox") observed, there is no guarantee that the PD, if adopted as written, would make broadband available in areas that today do not have access to

¹ See Comments of Sprint Nextel on Proposed Decision Implementing California Advanced Services Fund ("Sprint Nextel Comments"), *filed* December 10, 2007, available at: <http://docs.cpuc.ca.gov/eFile/CM/76369.pdf>, at 1, 13.

² See *id.* at 13.

³ See *id.* at 14.

broadband.⁴ Virtually all parties, even including AT&T and Verizon, urge the Commission to strictly confine CASF funding to “unserved” areas.⁵ It does not appear that any party supports use of the concept of an “underserved” area, especially as defined in the PD.⁶ The principal question, therefore, is, “What is an ‘unserved’ area?” Plainly, the answer depends on how “broadband” is defined. In these Reply Comments, taking account of the opening comments of these and other parties, Sprint Nextel proposes adoption of a different test for identifying a “served” area *for CASF purposes*, one that is consistent with the Legislature’s approach in DIVCA⁷ and can likely be used with greater administrative ease. This is the definition of “broadband” already being used by the Federal Communications Commission (“FCC”), namely, an Internet access service offering at least 200 kilobits per second (kbps) in either direction.⁸

If the definition of the FCC were used, much of California would be deemed “already served” and the CASF could be focused on those areas where it is most needed (assuming it is

⁴ See Opening Comments of Cox California Telcom, L.L.C., *filed* December 10, 2007, at 4 (“While the PD is premised on deployment of broadband services, including applications supporting voice-grade service, to consumers who do not have access to such services in rural and remote areas, it provides no guarantee or requirement that subscribership of either service will increase due to CASF or that consumers who lack such services today will actually have access to such services in the future”). One of Sprint Nextel’s principal concerns is that the CASF will be used to provide subsidies to carriers competing against Sprint Nextel in areas where Sprint Nextel already provides wireless (mobile) broadband services.

⁵ See Opening Comments of Pacific Bell Telephone Company d/b/a AT&T California *et al.* (“AT&T”), *filed* December 10, 2007 at 2; see Opening Comments of Verizon, *filed* December 10, 2007, at 2; see also Opening Comments of Small LECs, *filed* December 10, 2007 at 3; Cox Comments of Cox at 3; Opening Comments of the Division of Ratepayer Advocates, *filed* December 10, 2007, at 6-7; Opening Comments of California Cable and Telecommunications Association, *filed* December 10, 2007 at 2.

⁶ See PD at 40. AT&T correctly observes that, under the PD as drafted, an area that had numerous carriers offering Internet access at “slightly lower speeds” than the PD’s proposed definition of “broadband” (3 megabits per second (“MBPS”) downstream and 1 MBPS upstream) would be considered “unserved.” See AT&T Comments at 2.

⁷ Digital Infrastructure and Video Competition Act (“DIVCA”), Stats. 2006, c. 700 (A.B. 2987), § 3, *codified at* Public Utilities Code Section (“PU Code §”) 5800 *et seq.* The Legislature defined “broadband” as “any service defined as broadband in the most recent [FCC] inquiry pursuant to Section 706 of the Telecommunications Act of 1996 (P.L. 104-104).” *Id.*, § 5830, subd. (a). As Verizon notes, the FCC is currently conducting a proceeding in which the definition of “broadband” is at issue. See Verizon Comments at 5-6, nn. 15, 16, *citing In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket 07-38. Such parties as the United States Telephone Association and CTIA – The Wireless Association® urge the FCC not to change its current definition of broadband. This Commission can, and should, await FCC action on this issue.

⁸ See High-Speed Services for Internet Access: Status as of June 30, 2006, Industry Analysis and Technology Division, Wireline Competition Bureau, January, 2007, at 1, n.2, n. 4, available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf, cited in PD at 4, n. 8. See also *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Notice of Inquiry, FCC 07-21 (rel. April 16, 2007), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-21A1.pdf, at 4-5, ¶ 12 and nn. 15-17. Although the FCC has inquired whether its definition of “broadband” should be changed, see *id.*, there is no indication it will be changed soon. Accordingly, there is no need for this Commission to adopt a different definition and certainly no need for the extreme “3 MBPS downstream / 1 MBPS upstream” definition proposed in the PD.

needed at all). As AT&T points out, broadband Internet access service is “available by cable modem in 98 percent of California homes where cable systems offer cable TV service, and in 83 percent of California homes where incumbent LECs offer local telephone service.”⁹ Verizon states that, as of December, 2005, 84 percent of California connections to the Internet experienced broadband speeds between 200 kbps and 10 megabits per second (MBPS).¹⁰ Thus, under the FCC’s standard, most of California would be considered “served,” a conclusion that accords with the Commission’s own conclusion in D.06-08-030.¹¹ In contrast, if the PD’s definition of “broadband” is used – namely, Internet access that has *both* 3 MBPS downstream and 1 MBPS upstream¹² – most of California would be considered “unserved.” Verizon notes that, as of September, 2006, *at least* 54 percent of broadband connections in California would not be considered “broadband” under the PD because, in the fast direction, they do not meet the 3 MBPS threshold.¹³ The proposition, however, that “at least 54 percent of California does not have access to broadband” and is therefore “unserved” does not accord with common experience. Accordingly, the Commission should revise its definition of “broadband” for CASF purposes.¹⁴

Unless the CASF is fundamentally redesigned, it appears likely that the \$100 million CASF fund will simply be, for all practical purposes, a general subsidy for incumbent local exchange carriers (“ILECs”) to help them meet DIVCA and other preexisting obligations,¹⁵ not

⁹ See AT&T Comments at 6. The statistics apparently utilize the FCC’s definition of high-speed Internet access of at least 200 kbps in one direction, and not the PD’s definition of “broadband” at 3 MBPS downstream and 1 MBPS upstream.

¹⁰ See Verizon Comments at 4.

¹¹ *Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of Telecommunications Utilities*, R.05-04-005, Opinion [D.06-08-030] (2006) __ CPUC 2d __, 2006 Cal. PUC LEXIS 367 (“D.06-08-030”) (*mimeo.*) at 132, 263-68, *modified and limited rehearing granted and rehearing otherwise denied* [D.06-12-044] (2006) __ CPUC 2d __, 2006 Cal. PUC LEXIS 511. In fact, the Commission stated that the evidence showed that “. . . broadband is available in one hundred percent of all California ZIP codes.” *Id.* at 164. The Staff’s September 2006 Broadband Update Report states that “multiple service platform options are available in 97.7% of California zip codes. . . .” *Id.* at 24.

¹² See PD at 34.

¹³ See Verizon Comments at 2. It is unclear whether faster connections are not available or, as seems more likely, consumers have chosen not to pay for faster connections since they are satisfied with broadband access to the Internet at speeds above 200 kbps.

¹⁴ The PD does not identify how much of California would be considered “unserved” under a definition of “broadband” different from that offered in the PD. A decision creating a CASF would be less open to doubt concerning the Commission’s real intentions if the Commission were to ask: How much of California would be considered “unserved” if the Commission were to adopt the FCC’s definition of “broadband”? Would a subsidy program really be necessary or even worth the investment required to try to bring wireline broadband to the few California homes that do not have access to broadband as it has been defined by the FCC? Is it truly necessary to spend \$100 million to make broadband available to a comparative handful of residences that may not actually want or need it? Will there really be a significant boost to California’s economy if a few more homes have broadband?

¹⁵ DIVCA imposes substantial broadband service and “build out” requirements to ensure that low-income and rural customers will have access to broadband services. See PU Code § 5890. These requirements were imposed as preconditions to obtaining a statewide video franchise in California. In addition, as a subsidiary of AT&T Inc.,

in “unserved” but rather in allegedly “underserved” areas.¹⁶ The Commission should revise the CASF so that (a) only areas that are truly “unserved” are eligible for CASF funding and (b) an “unserved” area is defined using the FCC’s definition of broadband.

II. THE COMMISSION SHOULD MORE PRECISELY IDENTIFY THE SOURCE OF FUNDING FOR THE CASF.

It is one thing to propose a government program – and quite another to pay for it. As explained in Sprint Nextel’s Opening Comments,¹⁷ the Commission should have substantial doubts regarding the propriety of its taking \$100 million from the ratepayers of California to fund a service over which it does not have jurisdiction. Putting those doubts to one side, however, several parties pointed out that it is unclear, at best, how the Commission will fund the CASF. As Verizon delicately stated the matter, “. . . the PD fails to address the potential that insufficient funds will be available to allocate \$100 million to the CASF in its first two years of operation.”¹⁸ In short, the numbers do not add up.

Verizon makes a convincing showing of the problems the Commission will encounter if it attempts to fund the CASF from the California High Cost Fund-B (“CHCF-B”) program.¹⁹ Verizon’s calculations indicate that, if \$100 million is taken from CHCF-B program, there will be a shortfall in funds needed for the CHCF-B of approximately \$112 million, nearly 50 percent of the amount needed.²⁰ As T-Mobile observed, the PD “. . . suggests that *half* of the money to be collected from [the] CHCF-B surcharge can now be used for [the] CASF without otherwise affecting the funds necessary for [the] CHCF-B.” T-Mobile is correct: “That simply cannot be

Pacific Bell Telephone Company d/b/a AT&T California (“AT&T”) is *already* subject to a federal requirement that, by December 31, 2007, it must “. . . offer broadband Internet access service (*i.e.*, Internet access service at speeds in excess of 200 kbps in at least one direction) to 100 percent of the residential living units” within its service territory. *See In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. WC 06-74, Memorandum Opinion and Order, FCC 06-189 (released March 26, 2007), Appendix F at 147, Merger Commitments, “Promoting Accessibility of Broadband Service,” Commitment 1. This is a *voluntary* commitment by AT&T, undertaken to win approval from the Federal Communications Commission (“FCC”) of its acquisition of control of BellSouth Corporation. Given that AT&T is *already* obligated to bring broadband to *100 percent* of the residential living units in its service territory, it may certainly be asked why the ratepayers of California – including ratepayers of companies that compete against AT&T and that do not subscribe to AT&T local or broadband services – should be forced to spend even one dollar to help AT&T satisfy that obligation. The possibility that the CASF could be used for this purpose would certainly need to be factored into any review of CASF funding requests.

¹⁶ Whether it did so in error or not, the unfortunate fact is that the PD defined an “underserved” area as an area with only one broadband provider offering broadband Internet access service at 3 MBPS downstream and 1 MBPS upstream. *See* PD at 40. Even if this is regarded as an unintentional error, parties are still left to wonder what the PD truly intended to define as, or what the Commission may ultimately determine is, an “underserved” area.

¹⁷ *See id.* at 8-13.

¹⁸ Verizon Comments at 2; *see id.* at 9-10.

¹⁹ *Id.* at 10.

²⁰ *Id.*

accurate.”²¹ AT&T provides an even more compelling analysis that the CHCF-B program will experience a shortfall if the Commission takes \$100 million from the CHCF-B and allocates them to the CASF.²²

There are two conceivable explanations. First, the Commission may envision increasing the CHCF-B surcharge above the 0.5 percent level to which it was recently reduced in D.07-09-020.²³ As it controls and can easily adjust surcharge levels, with little public scrutiny, at virtually any time, this may well be what the Commission has in mind. Anticipating that possibility, Verizon urges the Commission not to increase the CHCF-B surcharge, but instead to string out collection and payment of CASF funds over three or four years.²⁴ Sprint Nextel agrees with the first recommendation, but strongly disagrees with the second, as it will tend to hide the CASF’s real funding source from the public. Second, the Commission may be counting on using a previously unmentioned overcollection in the CHCF-B program of \$124 million.²⁵ Evidently the PD does not plan on returning this overcollection to ratepayers as a credit against future CHCF-B surcharges but instead will make it available to fund the CASF.²⁶ Sprint Nextel believes the overcollection should be returned to those who created it – the ratepayers – through future reductions in the CHCF-B surcharge.

If it elects to proceed with the CASF, the Commission should provide more accurate calculations that convincingly reveal how it plans to fund the CASF. At least then ratepayers would understand how and why they are being taxed for the sake of broadband.

Conclusion

The Commission should either not create the CASF, as recommended by Sprint Nextel and T-Mobile,²⁷ or it should revise the CASF so that (a) it only funds broadband development in “unserved” areas and (b) “broadband” is defined as defined by the FCC. If it elects to proceed with the CASF, the Commission should also clarify how this program will be funded. The Commission would do best, however, to first obtain legislative authorization for the CASF.

²¹ See Comments of Omnipoint Communications, Inc., dba T-Mobile, *filed* December 10, 2007, at 14.

²² See AT&T Comments at 12-14. AT&T correctly observes that the Commission should clarify whether the CASF “is to be allocated \$100 million or half of what is really collected from the 0.5% [CHCF-B] surcharge [which would be approximately \$115 million], as those two numbers are almost certain to be different.” *Id.* at 12.

²³ *Order Instituting Rulemaking into Review of the California High Cost Fund B Program*, R.06-06-028, Interim Opinion Adopting Reforms to the High Cost Fund-B Mechanism [D.07-09-020] (2007) __ CPUC 2d __, 2007 Cal. PUC LEXIS, *app. for reh. pending* (filed October 9, 2007, by The Utility Reform Network (“TURN”))

²⁴ See Verizon Comments at 10.

²⁵ See AT&T Comments at 13.

²⁶ AT&T calculates that, even if the overcollection does occur, there will still be a shortfall if the Commission elects to fund the CASF with \$100 million. See AT&T Comments at 13-14.

²⁷ See T-Mobile Comments at 14.

Respectfully submitted:

SPRINT NEXTEL

By /s/
Earl Nicholas Selby

Stephen H. Kukta, Esq.
Kristin L. Jacobson, Esq.
Sprint Nextel
200 Mission Street, Suite 1400
San Francisco, CA 94105
Telephone: (415) 572-8358
Facsimile: (415) 278-5303
Email: Stephen.h.Kukta@Sprint.com

Earl Nicholas Selby
Law Offices of Earl Nicholas Selby
418 Florence Street
Palo Alto, CA 94301-1705
Telephone: (650) 323-0990
Facsimile: (650) 325-9041
Email: ens@loens.com

Attorneys for Sprint Nextel

Dated: December 17, 2007

Certificate of Service

I, Earl Nicholas Selby, hereby certify that, on December 17, 2007, I caused a copy of the foregoing document, entitled:

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ON PROPOSED DECISION IMPLEMENTING
CALIFORNIA ADVANCED SERVICES FUND**

to be served on the parties to this proceeding by electronic mail to the electronic mail addresses on the service list maintained on the Commission's Web site for this proceeding, as indicated on the following page.

I also certify that, on December 17, 2007, I caused a copy of the foregoing document to be served on the following persons at the California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, CA 94102, by United States Mail, first class postage prepaid:

Commissioner Rachelle B. Chong, Advisor Robert Haga, and Administrative Law Judge Thomas R. Pulsifer. I further certify that, on December 17, 2007, I caused a copy of the foregoing document to be served on: La Tanya Linzie, Cox California Telcom, LLC, 2200 Powell Street, Suite 1035, Emeryville, CA 94608, by United States Mail, first class postage prepaid.

I certify that the above statements are true and correct.

Dated: December 17, 2007 at Palo Alto, CA.

_____/s/
Earl Nicholas Selby

Electronic Service List

ksaville@czn.com; Aloa.Stevens@frontier.com; jesus.g.roman@verizon.com;
esther.northrup@cox.com; cmailloux@turn.org; elaine.duncan@verizon.com; rcosta@turn.org;
bnusbaum@turn.org; ndw@cpuc.ca.gov; david.discher@att.com; michael.foreman@att.com;
peter.hayes@att.com; Stephen.h.Kukta@sprint.com; thomas.selhorst@att.com;
pcasciato@sbcglobal.net; jclark@gmssr.com; mtobias@mlawgroup.com;
mschreiber@cwclaw.com; smalllecs@cwclaw.com; suzannetoller@dwt.com; ens@loens.com;
tlmurray@earthlink.net; douglas.garrett@cox.com; lmb@wblaw.net; ll@calcable.org;
pucservice@dralegal.org; scratty@adelphia.net; cborn@czn.com; beth.fujimoto@cingular.com;
cindy.manheim@cingular.com; trevor@roycroftconsulting.org; john.frentrup@sprint.com;
PHILILLINI@aol.com; don.eachus@verizon.com; jacque.lopez@verizon.com;
mshames@ucan.org; marcel@turn.org; rudy.reyes@verizon.com;
Kristin.L.Jacobson@sprint.com; mtobias@mlawgroup.com; jwiedman@goodinmacbride.com;
deyoung@caltel.org; mmattes@nossaman.com; katiensel@dw.com; ens@loens.com;
anitataffrice@earthlink.net; mp@calcable.org; general@dralegal.org;
joe.chicoine@frontiercorp.com; mcf@calcomwebsite.com; alk@cpuc.ca.gov; aba@cpuc.ca.gov;
dgw@cpuc.ca.gov; gtd@cpuc.ca.gov; jjs@cpuc.ca.gov; kar@cpuc.ca.gov; lah@cpuc.ca.gov;
mal@cpuc.ca.gov; nxb@cpuc.ca.gov; ncl@cpuc.ca.gov; psp@cpuc.ca.gov; rwc@cpuc.ca.gov;
rwh@cpuc.ca.gov; trp@cpuc.ca.gov; tch@cpuc.ca.gov; randy.chinn@sen.ca.gov